



Paper No. 10

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JAN 25 2002

In re Application of:
HEHENBERGER, RODNEY K., *et al.*
Application No. 09/369,410
Filed: 08/03/1999
Attorney Docket No. 54982US1A002

OFFICE OF PETITIONS

**DECISION ON
PETITION**

This is a decision on the renewed petition under 37 C.F.R. §1.10(d) or, in the alternative, 37 C.F.R. §1.10(c) or, in the alternative, under 37 C.F.R. §1.182 or 37 C.F.R. §1.183 for correction of the filing date and issuance of a corrected filing receipt, filed on August 3, 1999. The decision that Petitioner seeks reconsideration of was mailed on January 29, 2001.

THE RULE

37 C.F.R. § 1.10 Filing of correspondence by "Express Mail."

(a)...

(b)...

(c) Any person filing correspondence under this section that was received by the Office and delivered by the "Express Mail Post Office to Addressee" service of the USPS, who can show that there is a discrepancy between the filing date accorded by the Office to the correspondence and the date of deposit as shown by the "date-in" on the "Express Mail" mailing label or other official USPS notation, may petition the Commissioner to accord the correspondence a filing date as of the "date-in" on the "Express Mail" mailing label or other official USPS notation, provided that:

(1) The petition is filed promptly after the person becomes aware that the Office has accorded, or will accord, a filing date other than the USPS deposit date;

(2) The number of the "Express Mail" mailing label was placed on the paper(s) or fee(s) that constitute the correspondence prior to the original mailing by "Express Mail;" and

(3) The petition includes a true copy of the "Express Mail" mailing label showing the "date-in," and of any other official notation by the USPS relied upon to show the date of deposit.

(d) Any person filing correspondence under this section that was received by the Office and delivered by the "Express Mail Post Office to Addressee" service of the USPS, who can show that the "date-in" on the "Express Mail" mailing label or other official notation entered by the USPS was incorrectly entered or omitted by the USPS, may petition the Commissioner to accord the correspondence a filing date as of the date the correspondence is shown to have been deposited with the USPS, provided that:

(1) The petition is filed promptly after the person becomes aware that the Office has accorded, or will accord, a filing date based upon an incorrect entry by the USPS;

(2) The number of the "Express Mail" mailing label was placed on the paper(s) or fee(s) that constitute the correspondence prior to the original mailing by "Express Mail"; and

(3) The petition includes a showing which establishes, to the satisfaction of the Commissioner, that the requested filing date was the date the correspondence was deposited in the "Express Mail Post Office to Addressee" service prior to the last scheduled pickup for that day. Any showing pursuant to this paragraph must be corroborated by evidence from the USPS or that came into being after deposit and within one business day of the deposit of the correspondence in the "Express Mail Post Office to Addressee" service of the USPS.

ANALYSIS

Petitioner alleges that the application was deposited in Express Mail service on August 5, 1999, rather than on the date currently accorded to this application (August 3, 1999).

Relief under 37 C.F.R. §1.10(c)

Petitioner requests relief under rule 10(c) based upon the theory that the USPTO misread the handwritten "date in" on the Express Mail receipt to indicate an August 3, 1999 deposit date rather than an August 5, 1999 deposit date. To support this theory, Petitioner asks the office to note several circumstantial issues that Petitioner believes to support his theory. Specifically, Petitioner alleges that this application was one of five mailed on August 5, 1999, and that:

- all five were handled by the same postal worker, as indicated by the similar handwriting on the receipts and the same initials placed on the receipts;
- all five were processed within five minutes of each other;
- the customer portion of each label indicates an August 5, 1999 deposit;

- all label numbers are generally in ascending order; with the number corresponding with this application being in the middle of the grouping;

all other receipts clearly indicate an August 5, 1999 deposit.

However, this is not persuasive. The original Express Mail label is in the application file. The date entered is clearly legible and clearly indicates a "date in" of August 3, 1999. Further avoiding any ambiguity, the label is clearly and legibly stamped with the notation:

"EXPRESS MAIL

AUG 03 1999

USPS DATE OF DEPOSIT"

Thus, the date of deposit is twice clearly and legibly indicated on the Express Mail label as August 3, 1999 and relief under rule 10(c) would clearly not be appropriate.

Relief under 37 C.F.R. §1.10(d)

Notwithstanding Petitioner's argument about what evidence constitutes USPS evidence within the meaning of rule 10(d), the evidence provided is, by Petitioner's own characterization, circumstantial. No matter how persuasive that evidence may seem, the Commissioner finds it unlikely that the postal acceptance clerk correctly wrote the date for the first three applications in the series of applications at issue, illegibly wrote the date of deposit on the label for the application at issue so that it arguably reads August 3, 1999, set the date on his date of deposit stamp to August 3, 1999, stamped the label as having been deposited on August 3, 1999, and then proceeded to re-set the date in stamp forward to August 5, 1999 for the remaining applications and writing August 5, 1999 on those.

In sum, Petitioner's "USPS" evidence does not overcome the clear entries of the date in on the Express Mail label associated with this application.

Relief under 37 C.F.R. §1.182

Petitioner seems to believe that if he is unable to meet the requirements for a grantable petition under rule 10, then the situation falls into the category of being one that is not provided for in the rules and that thus, rule 182 relief is appropriate.

That is a remarkable position. If the Commissioner were to accept that line of reasoning, there would be no circumstance under which any petition could be dismissed. Inability satisfy the requirements of a rule would automatically turn the situation into one not provided for under the rules.

Contrary to Petitioner's assertion, the situation at hand is provided for in the rules. Specifically, where the requirements of rule 10 have not been met, the rules provide that a dismissal of the petition is appropriate.

Accordingly, relief under 37 C.F.R. §1.182 is inappropriate under these circumstances.

Relief under 37 C.F.R. §1.183

Petitioner asserts that the existence of a "clear" error mandates a waiver of the rules in the interests of justice if no other rule provides the appropriate relief. However, no clear error has been presented. Rather, there is an Express Mail label that clearly indicates a date in of August 3, 1999. This indication is clearly made twice. Petitioner has circumstantial evidence to contradict these entries, but it is not so compelling as to contradict the indications on the Express Mail label.

Accordingly, no extraordinary situation has been presented, and relief under 37 C.F.R. §1.183 is inappropriate at this time.

In view of the above, *this petition requesting relief under 37 C.F.R. §§1.10, 1.182, & 1.183 is **dismissed**.*

Any request for reconsideration of this decision must be submitted within TWO (2) MONTHS from the mail date of this decision. The reconsideration request should include a cover letter entitled "Renewed Petition under 37 C.F.R. §1.10".

Further correspondence with respect to this matter should be addressed as follows:

By mail: Assistant Commissioner for Patents
Box DAC
Washington, D.C. 20231

By FAX: (703) 308-6916
Attn: Office of Petitions

By hand: Office of Petitions
Four Crystal Plaza, Suite 3C23
2201 South Clark Place
Arlington, VA 22202

Telephone inquiries concerning this matter may be directed to Petitions Attorney Scott M. Ledford in the Office of Petitions at (703) 306-5593.



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